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*Attorneys for the Utah Division of Consumer Protection*

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**BEFORE THE DIVISION OF CONSUMER PROTECTION  
OF THE DEPARTMENT OF COMMERCE  
OF THE STATE OF UTAH**

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**IN THE MATTER OF:**

**PURDUE PHARMA L.P.**, a Delaware limited partnership; **PURDUE PHARMA INC.**, a New York Corporation; **THE PURDUE FREDERICK COMPANY**, a Delaware corporation; **RICHARD SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities; and **KATHE SACKLER, M.D.**, individually and as an owner, officer, director, member, principal, manager, and/or key employee of the above named entities;

**Respondents.**

**DIVISION'S MOTION TO BIFURCATE  
PROCEEDING PURSUANT TO R.151-4-  
704**

**DCP Legal File No. CP-2019-005**

**DCP Case No. 107102**

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The Utah Division of Consumer Protection ("Division") respectfully requests that the Tribunal bifurcate this proceeding. As explained below, the Tribunal as the authority to bifurcate this proceeding into a findings phase and a sanctions phase if it finds "good cause" for such

bifurcation. Here, the “good cause” for bifurcation includes furthering the public interest in prompt resolution of this proceeding, increasing the efficiency of the proceeding, conserving Tribunal and party resources, adding clarity to case presentation and increasing the possibility of settlement. Further and importantly, bifurcation does not prejudice any party. For all these reasons, the Division respectfully requests that the Tribunal enter a bifurcation order that adopts the presently-operative Scheduling Order for the findings phase. With respect to the Scheduling Order for the sanctions phase, the Division respectfully appends a suggested schedule for consideration.

### ***ARGUMENT***

***I. This Tribunal Has the Discretionary Authority To Order Bifurcation of the Hearing Into a Findings Phase and a Sanctions Phase.***

Department of Commerce Administrative Procedures Act Rule (“Rule”) 151-4-704 expressly provides for the option of bifurcation: “[t]he presiding officer may, for good cause, order a hearing bifurcated into a findings phase and a sanctions phase.” R151-4-704. Although the Division has not seen any published decisions on point construing R151-4-704 and interpreting “good cause,” it is aware of other cases in which the Presiding Officer has bifurcated hearings.

This Tribunal may look to bifurcation practices in other fora to guide the application of the “good cause” standard. In Utah civil courts, Rule 42(b) of the Utah Rules of Civil Procedure allows a court to order separate trials of any claim or any separate issue if doing so is “in further of convenience or to avoid prejudice.” *See, e.g., Clayton v. Ford Motor Co.*, 2009 UT App 154, ¶¶ 34-35, 214 P.3d 865, 874 (2009) (“[W]e see no error in the trial court's decision to bifurcate the damages and liability portions of the case.”); *Wood v. Wood*, 2004 UT App 343 (2004) (“Trial courts have been granted broad discretion in deciding the outcome of motions to

consolidate or bifurcate.”); *Parker v. Parker*, 2000 UT App 30, 996 P.2d 565 (2000) (permissible to bifurcate a divorce proceeding for the convenience of the parties).

In federal courts sitting in Utah, Fed.R.Civ.P.42(b) applies, and allows a “court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim . . . or of any issue”. The appellate courts routinely uphold the discretion of district courts to bifurcate based on efficiency. *See e.g., U.S. ex rel. Bahrani v. ConAgra, Inc.*, 624 F.3d 1275, 1283–84 (10th Cir. 2010) (bifurcating issues in the interest of efficiency in *qui tam* case); *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 964 (10th Cir. 1993) (“While separation of issues for trial is not to be routinely ordered, it is important that it be encouraged where experience has demonstrated its worth.”). Federal district courts in Utah view “bifurcat[ing] trial of liability and damages issues in many kinds of litigation” has been described as an “obvious use” of available procedures. *See also T.J. Smith & Nephew Ltd. v. Deseret Med.*, 85-C-0615W, 1985 WL 73295, at \*1–4 (D. Utah Nov. 19, 1985).

Importantly, the Utah federal district courts are more inclined to grant bifurcation if requested by the plaintiff rather than the defendant, reasoning that the prosecuting party enjoys a strong presumption that it is permitted to present its case in the order it chooses. *See, e.g., Sensitron, Inc., v. Wallace*, 504 F. Supp.2d 1180, 1186 (D. Utah 2007); *Patten v. Lederle Labs.*, 676 F. Supp. 233, 238 (D. Utah 1987).

## ***II. “Good Cause” Exists Here.***

Guided by the above precedents, the Tribunal should exercise its discretion and find “good cause” to bifurcate the instant proceeding into a findings and sanctions phase. Specifically, bifurcation will conserve public and private resources, increase the efficiency of the

proceedings, add clarity and logic to both discovery and case presentation, and increase the likelihood of settlement. Bifurcation does not prejudice any party. In short, good cause exists to bifurcate the proceedings into findings and sanctions phases.

**A. Bifurcation Serves the Public Interest.**

In exercising its discretion on whether good cause exists to bifurcate the proceedings into findings and sanctions phases, the Tribunal should consider the public interest in prompt adjudication of the Respondents' liability. The Division acts in the public interest to enforce the Utah Consumer Sales Practices Act ("CSPA"). *See, e.g., State By and Through Div. of Consumer Protection v. GAP Corp.*, 760 P.2d 310, 312 (Utah 1988), explain that the statutory scheme "contemplates that the Division will act at the behest of consumers." *See also State of Utah by Wilkinson v. B&H Auto*, 701 F.Supp. 201, 205 (D. Utah 1988) (purpose of CSPA to protect consumers). The Division's Citation explains how the public has been harmed by the Respondents' deceptive practices in the marketing and selling prescription opioids. Delaying both the findings and sanctions phases of the hearing until March 2020 unnecessarily harms the public interest. By contrast, allowing the sanctions phase to proceed conserves the public resources of the Division, as well as the private resources of Respondents, who could avoid any expenditures related to the sanctions phase if they prevail during the findings phase.

**B. Bifurcation Increases Efficiency, Resolves Discovery Issues, and Conserves Resources.**

Bifurcation increases the efficiency of the proceedings, resolves discovery issues, and conserves resources. *See U.S. v. Allen*, 16 F.3d 377, 378-9 (10<sup>th</sup> Cir. 1994) (noting in different context the importance of furthering "the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice.") The Tribunal voiced concern about the progress of discovery. With a bifurcated schedule, the parties will be able to

maintain the discovery momentum, and stage the discovery into the two phases. The Division will be able to complete its sanctions production in the immediate future.<sup>1</sup> The Division and Respondents will be able to postpone production regarding measurement and mitigation until completion of the findings phase. The parties will be able to focus and complete findings discovery without burdening the Tribunal with adjudicating disputes relevant only to sanctions phase. As a result, bifurcation will lessen the demands placed on the Tribunal.

**C. Bifurcation Adds Clarity and Logic the Case Presentation.**

Bifurcation will result in greater clarity and logic during case presentations. During the first findings phase, the parties will be able to focus only on the liability and personal jurisdiction issues, which, standing alone, are fact-intensive. The more narrow scope of issues will allow for a sharper and more efficient case presentation by both parties. Indeed, such a narrowing of the issues allows the parties to avoid needing to ask for the Tribunal for additional hearing time. In the event the Division prevails and a sanctions phase hearing occurs, the parties will benefit from having the Tribunal's findings inform their case presentations. Bifurcation thus will allow the parties to put on more focused and efficient cases on both findings and sanctions.

**D. Bifurcation Increases the Possibility of Settlement.**

Bifurcation increases the possibility that the parties will be able to settle this matter. As explained in *Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 468 (D. Utah 1991), "absent overriding considerations, the history tradition and policy of law is to encourage dispute resolution through settlements rather than litigation," citing *Society of Professional Journalists v. Briggs*, 675 F. Supp. 1308, 1310 N. 3 (D. Utah 1987). If the Division prevails in the findings phase, the

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<sup>1</sup> Note, Respondents served contention interrogatories, essentially requiring the Division to produce back to Respondents documents and other evidence already available to the parties. The Division and Respondents are working together through the meet and confer process to resolve how best to proceed on such contention interrogatories.

Respondents may opt to reach a voluntary settlement rather than return to the Tribunal for the sanctions hearing. This outcome conserves both public and private resources.

**E. Bifurcation Does Not Prejudice Any Party.**

The Division requests bifurcation to prevent undue delay of an administrative proceeding that has substantial value to the public. As the prosecuting party, the Division enjoys a presumption that it is permitted to present its case in the order it chooses. *See, e.g., Sensitron, Inc., v. Wallace*, 504 F. Supp.2d 1180, 1186 (D. Utah 2007); *Patten v. Lederle Labs.*, 676 F. Supp. 233, 238 (D. Utah 1987). Here, it seems fitting that such a presumption is entitled to even greater weight than accorded to a private party prosecuting a private claim.

The Respondents cannot articulate any credible claim of prejudice. If the Tribunal bifurcates the proceeding into a findings phase and a sanctions phase, and holds the findings phase on the same schedule as presently in place, Respondents will enjoy a lessened discovery burden because discovery relating to the sanctions phase will be deferred until the conclusion of the findings phase. If the Division does not prevail during the findings phase, there will be no need to conduct discovery, present experts, or undertake proceedings in the sanctions phase. If there is a partial judgment for the Division, the issues (and Respondents) may be narrowed, also narrowing the issues and evidence to be resolved at a penalties phase. This helps, rather than prejudices, the Respondents.

For all these reasons, the Tribunal should find that “good cause” exists and bifurcate the hearing into a findings and sanction phase. In practical terms, the Tribunal should issue a new, bifurcated Scheduling Order that uses the existing dates for the findings phase. The parties carefully negotiated the existing dates and have had them blocked out on their calendars for months.

WHEREFORE, the Division respectfully requests that the Presiding Officer order bifurcation of the hearing into a findings and sanctions phase.

DATED this 2<sup>nd</sup> day of August, 2019.

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**CERTIFICATE OF SERVICE**

I certify that I have served or will serve the foregoing document on the parties of record in this proceeding set forth below:

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Dated this 2<sup>nd</sup> day of August, 2019.

/s/ Lisa Saltzburg \_\_\_\_\_

Lisa Saltzburg



## **Division's Proposed Bifurcated Scheduling Order**

### **Phase I – Findings**

August 30, 2019 – complete discovery

September 9, 2019 – any supplemental reports by expert witnesses

September 16, 2019 – rebuttal reports by expert witnesses

September 20, 2019 – exchange final disclosures

September 24, 2019 – Daubert and dispositive motions, motions in limine

October 15, 2019 – hearing

### **Phase II – Sanctions**

December 3, 2019 – complete discovery

December 23, 2019 – exchange final disclosures

January 3, 2020 – rebuttal reports by expert witnesses

January 16, 2020 – dispositive and Daubert motions

January 21, 2020 – motions in limine

February 25, 2020 – hearing